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Losing My Edge: The Copyright Implications of Audio blogging and Why Blogs Matter to the Music Industry

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Losing My Edge¹: The Copyright Implications of Audioblogging and Why Blogs Matter to the Music Industry

ABSTRACT

In the past decade, the information distribution channels for music have changed dramatically. Not only have they largely moved from radio and print to online sources, but many audioblogs have formed to cover various niches according to the individual tastes of bloggers. This democratization of music criticism has been popular with listeners, as the information is easily and immediately available as well as tailored to a particular interest.

A defining feature of the audioblog is the inclusion of a downloadable MP3 in each post. In some cases, especially for more popular audioblogs, the download is approved by the copyright holder. In most cases, however, songs are posted without approval. This creates obvious copyright infringement implications.

Because audioblogs serve a valuable function, this Note looks within copyright law for a potential exemption for these posts, focusing on the fair use defense. Through an analysis of the four factors of the traditional fair use test, the Note concludes that, based on current precedent, a court would not likely find that this use falls within fair use. Under the current law, however, it is possible that music labels will not bring infringement cases to court, relying instead on their DMCA rights.

As a result of the potential liabilities and the tactics and beliefs of copyright owners, this Note then considers a variety of solutions to resolve the tension between marketing, information sharing, and infringement, considering the current state of technology. Finally, it concludes with a look forward at a potentially ideal system that would

1. LCD SOUNDSYSTEM, *Losing My Edge*, on LOSING MY EDGE B/W BEAT CONNECTION (DFA Records 2002) (“But I’m losing my edge to better-looking people with better ideas and more talent/And they’re actually really, really nice.”).

capture the appeal and utility of audioblogs while satisfying the requirements of copyright.

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In the flickering light of a computer screen, a teenager cruises the Internet, searching audioblogs and websites for information about her favorite bands and music genres. Intrigued by something she finds, she right-clicks on a link and downloads a song in MPEG-1 Audio Layer 3 (MP3) format. Some argue that in this instant the copyright owner has become poorer.² Others claim that the same instant is the first step towards a purchase that would not have otherwise occurred.³ But is either the true effect of the fan's action? Has this young woman just become an accomplice in a copyright infringement or has she participated in a cutting-edge marketing and distribution method? And, perhaps most importantly, what does this mean for the future of the music industry?

2. See John Schwartz, *A Heretical View of File Sharing*, N.Y. TIMES, Apr. 5, 2004, at C1, available at <http://query.nytimes.com/gst/fullpage.html?res=9C02E2D91139F936A35757C0A9629C8B63&sec=technology&spon=&partner=permalink&exprod=permalink>.

3. See studies cited notes 178-79.

The ability to copy content creates a need to protect that content from infringers, both potential and actual. In fact, the printing press—history's first influential copying innovation—was part of the impetus for the creation of intellectual property laws that have evolved into today's copyright statutes.⁴ The innovation of blank media, such as cassettes—and, later, compact disc-recordables—resulted in legislation seeking to offset the revenue that would be lost to copying.⁵ However, the most recent innovation, the Internet, is in a category all its own.

The Internet's effects on the music industry have been drastic.⁶ The ability to losslessly transmit data over the Internet, coupled with the compact size of an MP3 file,⁷ has fundamentally changed the way music is transmitted—not to mention promoted, sold, and consumed.⁸ With compact discs (CDs) or cassettes, only one person can possess a copy at any given time. Over the Internet, a multitude of individuals can simultaneously download an MP3 file in less than a minute.⁹

Over the past decade, the music industry and music listeners have engaged in a tug of war over digital rights.¹⁰ Through digital rights management¹¹ and exclusive deals,¹² as well as court cases

4. *E.g.*, History of Copyright, Early Writing and Book Printing, http://www.historyofcopyright.org/pb/wp_27fa9cd0/wp_27fa9cd0.html (last visited Oct. 20, 2009).

5. Audio Home Recording Act of 1992, 17 U.S.C.A. §§ 1001-10 (West 2009).

6. Glenn Peoples, *Analysis: What Can Replace Falling CD Revenues?*, BILLBOARD, May 18, 2009, http://www.billboard.biz/bbbiz/content_display/industry/e3id7e408c3343351325d3d9558cfe0dd9f (last visited Feb. 18, 2010) [hereinafter Peoples, *CD Revenues*].

7. A song in MP3 format is generally 10 to 14 times smaller than the same song on a CD, for a file size as small as 3 megabytes. How MP3 Files Work, <http://www.howstuffworks.com/mp3.htm> (last visited Feb. 18, 2010). In comparison, the average download speed for a broadband Internet connection is .125 megabytes per second, meaning that almost three such files could be downloaded per minute. See Chris Foresman, *US Broadband's Average Speed: 3.9 Mbps*, ARS TECHNICA, Jan. 18, 2010, <http://arstechnica.com/telecom/news/2010/01/us-broadband-still-lagging-in-speed-and-penetration.ars>.

8. Charles Mann, *The MP3 Revolution*, THE ATLANTIC, Apr. 8, 1999, <http://www.theatlantic.com/unbound/digicult/dc990408.htm>.

9. *Id.*

10. *The Slow Death of Digital Rights*, THE ECONOMIST, Oct. 13, 2007.

11. Wikipedia.org, Digital Rights Management, http://en.wikipedia.org/wiki/Digital_rights_management (last visited Oct. 20, 2009). Recently, the industry has begun to move away from DRM. See, e.g., Apple.com, Changes Coming to the iTunes Store, <http://www.apple.com/pr/library/2009/01/06itunes.html> (last visited Oct. 20, 2009). However, the move does not appear to be based on a change in its policy regarding intellectual property but rather an olive branch to dissatisfied customers. See, e.g., Don Reisinger, *DRM-free iTunes Store to Haunt Apple?*, CNET: THE DIGITAL HOME, Jan. 8, 2009, <http://news.cnet.com/drm-free-itunes-store-to-haunt-apple>.

beginning with *A&M Records, Inc. v. Napster, Inc.*,¹³ and continuing with individual file sharers, the industry attempted to keep control over the distribution of music over the Internet. More recently, the industry began to make efforts to embrace online marketing and distribution, most notably through iTunes, an online music store that allows users to legally purchase and download digital music.¹⁴ Meanwhile, consumers have quickly adapted to the Internet as a means of listening to and reading about new songs and artists on a variety of websites and blogs.¹⁵

Across the Internet, audiobloggers have devoted themselves to closely following developments in the music scene with the intention of spreading their discoveries to other interested listeners.¹⁶ Some audioblogs have become quite influential while others remain obscure.¹⁷ Regardless of their prominence, one hallmark of an audioblog is the inclusion of relevant MP3 files in each post.¹⁸

Making MP3 files available in a post significantly improves the usefulness of an audioblog, but it may expose the bloggers involved to significant copyright liabilities.¹⁹ By uploading a song, bloggers are violating the copyright holders' exclusive right to reproduce and distribute their work,²⁰ an offense punishable by civil and criminal penalties.²¹ So far, record labels have been largely tolerant of the practice, as it provides free advertising and helps them maintain an

12. See *Best Buy Snags Guns N' Roses Album Exclusive*, BILLBOARD.COM, http://www.billboard.com/bbcom/news/article_display.jsp?vnu_content_id=1003855688 (last visited Nov. 1, 2009).

13. 239 F.3d 1004 (9th Cir. 2001).

14. LAWRENCE LESSIG, REMIX 65-66 (Penguin Press 2008), available at <http://www.bloomsburyacademic.com/pdf%20files/Remix.pdf>.

15. E.g., Dave Itzkoff, *The Pitchfork Effect*, WIRED, Sept. 2006, available at <http://www.wired.com/wired/archive/14.09/pitchfork.html>.

16. See Matthew Honan, *Audioblogs Make a Joyful Sound*, MACWORLD, June 2, 2005, <http://www.macworld.com/article/45091/2005/06/audioblogs.html>.

17. Influence is a difficult quality to quantify, so visitors will have to suffice for the purposes of this Note. According to the traffic tracker Quantcast, popular audioblogs mentioned in this Note ranged from 8,400 to 56,800 visitors per month in the United States. Quantcast Audience Profile—Fluxblog, <http://www.quantcast.com/fluxblog.org> (last visited Feb. 19, 2010); Quantcast Audience Profile—Gorilla Vs. Bear, <http://www.quantcast.com/gorillavsbear.blogspot.com> (last visited Feb. 19, 2010). Because starting a blog is free, sources cited *infra* note 58, individuals may run audioblogs intended to be read by only a few people.

18. Wikipedia.org, MP3 Blog, http://en.wikipedia.org/wiki/MP3_blog (last visited Oct. 20, 2009).

19. See Honan, *supra* note 16.

20. 17 U.S.C.S. § 1006 (LexisNexis 2009).

21. 17 U.S.C.S. §§ 1203-1204 (LexisNexis 2009).

image as a consumer-friendly label.²² However, as the blogosphere enters the cultural mainstream, there are signs that copyright leniency is on the ebb.²³ As a result, new solutions and practices are necessary to protect the flow of useful cultural knowledge.

In Part I, this Note gives a brief history of the legal evolution and the foundations of copyright protection in the United States. Over the past century, copyright protection has expanded dramatically while retaining the same basic purpose of protecting a creator's work.²⁴ Unfortunately, copyright legislation also tends to be reactionary and is often heavily influenced by the lobbying of established content producers,²⁵ resulting in a system that is primarily concerned with preserving the status quo rather than accepting technological innovation.

This Note then discusses the rise of blogs and the audioblogging subculture. The blogging movement has provided a fast and efficient method of information dissemination over the Internet, especially for niche markets.²⁶ However, the legal implications of audioblogs have yet to be clearly deciphered, leaving independent bloggers vulnerable to financial liabilities.²⁷ In addition, because it is a community of individuals without any clear structure or leadership, the blogging community has little to no lobbying power and lacks the structure to effectively campaign for changes to copyright law as organizations have done.²⁸ Because the existing statutory structure creates great incentive for Internet service providers (ISPs) to accede

22. See Betsy Schiffman, *MP3 Blogs Offer File Sharing Even the RIAA Could Love*, WIRED, Dec. 4, 2007, http://www.wired.com/techbiz/media/news/2007/12/mp3_blogs.

23. Posting of Rick Klau to Blogger Buzz, <http://buzz.blogger.com/2010/02/quick-note-about-music-blog-removals.html> (Feb. 10, 2010, 14:31 EST).

24. See Wikipedia.org, United States Copyright—Duration of Copyright, http://en.wikipedia.org/wiki/United_States_copyright_law#Duration_of_copyright/ (last visited Feb. 19, 2010).

25. Aaron Johnson, *Pirates in Cyberspace: The Copyright Implications of A & M Records v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000), 80 NEB. L. REV. 125, 127 ("Congress has frequently found itself in a reactionary position as advances in technology have necessitated change.").

26. Honan, *supra* note 16 ("One area where audioblogs have a tremendous advantage over traditional media is in their ability to document small, genre-specific scenes.").

27. See Wikipedia.org, MP3 Blog – Legal status, http://en.wikipedia.org/wiki/MP3_blog#Legal_status (last visited Oct. 20, 2009).

28. In fact, the 1976 Act is sometimes referred to as the "Mickey Mouse Act." Paul Schwartz & William Treanor, *Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J. 2331 (2003) (citing Doug Bedell, *Professor Says Disney, Other Firms Typify What's Wrong with Copyrights*, DALLAS MORNING NEWS, Mar. 14, 2002, at 3D).

to Digital Millennium Copyright Act (DMCA) take-downs,²⁹ this imbalance is troubling.

In Part II, this Note analyzes the copyright issues in the audioblogging world, beginning with a discussion of how copyright violations may occur when an MP3 file is included in a blog post. The MP3 file is an essential element of an audioblog entry—but it is also the greatest source of potential liability.³⁰ The majority of the Note discusses the viability of defenses available when an audioblogger is charged with a copyright violation for posting an MP3. This analysis focuses largely on fair use, which is both the most complex and the most promising of these defenses. Additionally, this section briefly examines the current realities of the music industry to make sense of the differences between the industry's stance on file sharing and its lack of action against audiobloggers.

In Part III, this Note proposes a variety of solutions to clear up current cloudiness in statute application to audioblogs. This Note shows that the audioblogs serve a valuable function and therefore should not be shut down. Such protection can be accomplished through either economic or legislative means, a combination of which informs the conclusions discussed here. This Note proposes a solution that balances the interests of both copyright holders and audiobloggers. Possible solutions include a compulsory license system, a post approval system, and a centralized site of licensed streams that may be embedded into blogs. Particular emphasis is placed on embeddable licensed streams as an effective solution to the issue. The industry must be encouraged to embrace technological innovation before it is too late. While rigid adherence to tradition will only make record labels' survival more difficult in the face of change, a willingness to work with new technologies has the potential to benefit both consumers and creators of music.

29. Under the Digital Millennium Copyright Act, an online service provider hosting allegedly infringing content avoids liability by honoring requests by the copyright holder to take down the content. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended at 17 U.S.C.S. §§ 101-505 (LexisNexis 2009)). As a result, many online services will simply take down the content and leave it up to the user to challenge the take-down. See Posting of Rick Klau, *supra* note 23. This can be a major problem for audiobloggers, especially when it is unclear who initiated the take-down and why they did so. *Id.* In a recent case, a court required that rights holders perform a fair use analysis before sending a DMCA take-down notice, *Lenz v. Universal Music Corp.*, 572 F.Supp.2d 1150, 1155 (N.D. Cal. 2008), but, without precedent establishing fair use for audiobloggers, that heightened standard is of no assistance.

30. Honan, *supra* note 16.

I. BACKGROUND

A. Statutes set the stage

The Constitution gives Congress the power “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”³¹ In their first incarnation, the Copyright Act of 1790, the copyright laws were fairly narrow.³² With the passage of time, however, both science and art have changed dramatically, and copyright law has been broadened to take these changes into account. The first copyright legislation protected works for fourteen years and allowed renewal for another fourteen years.³³ In 1909, the length of copyright protection was increased to twenty-eight years with an identical renewal term.³⁴ In addition, the 1909 Act expanded the scope of protection to include all written material.³⁵

Over the next century, copyright law continued to evolve as the arts and sciences progressed at an exponential pace. By 1976, entirely new forms of content, such as sound recordings, were created and distribution changed fundamentally with the introduction of television and radio broadcasting.³⁶ Consumers could experience many types of content without even leaving their homes.³⁷ In addition, advances in music recording made it possible for consumers to easily duplicate copyrighted content.³⁸ These issues, among others, were central in the minds of lawmakers, who once again increased the scope of copyright protection.³⁹ This Act changed the duration of copyright terms from a

31. U.S. CONST. art. I, § 8, cl. 8.

32. Copyright Act of 1790, *available at* <http://www.copyright.gov/history/1790act.pdf>. This followed from the British precedent in the Statute of Anne. That statute was influential in giving rights to authors over publishers, who had previously held the intellectual property rights on the works that they published. Wikipedia.org, Copyright, <http://en.wikipedia.org/wiki/Copyright> (last visited Oct. 20, 2009). This was an important shift in the exclusive rights from the content distributors to the content producers. *See id.*

33. *Id.*

34. Copyright Act of 1909, *available at* <http://www.copyright.gov/history/1909act.pdf>.

35. *Id.*

36. H.R. REP. NO. 94-1476 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 1976 WL 14045.

37. *Id.*

38. Audio Engineering Society, Audio Timeline, <http://www.aes.org/aeshc/docs/audio.history.timeline.html> (last visited Oct. 20, 2009).

39. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C.S. §§ 101-505 (LexisNexis 2009)). By this point, content creators had grown to be powerful economic players in addition to their previous social influence. This allowed them to put

renewal system to the lifetime of the author plus fifty years.⁴⁰ Congress added an additional twenty years to the term in 1998,⁴¹ bringing the total copyright coverage to author's lifetime plus seventy years, far in excess of the original Act's fourteen years and creeping closer to an unlimited, rather than limited, monopoly.⁴² Despite this enormous duration increase, the 1976 Act balanced economic interests and expectations by codifying the fair use doctrine.⁴³

In 1997 and 1998, content owners scored more legislative victories with the No Electronic Theft Act (NET) and the DMCA.⁴⁴ The NET Act significantly increased the criminal penalties for copyright violations with commercial implications by adding potential jail time to the list of consequences.⁴⁵ The DMCA attached civil and criminal penalties to any use of technology to circumvent anti-piracy measures.⁴⁶ The DMCA balanced this heavy stick with a safe harbor provision for online service providers (which includes ISPs) by exempting liability for compliance with a take-down notice, which is a request by the copyright holder for the site to remove allegedly infringing content.⁴⁷

Since the passage of these laws, the record industry has experienced dramatic decreases in album sales,⁴⁸ largely attributed to

forth a significant lobbying effort that is reflected in the expansions of protection. *See* Schwartz & Treanor, *supra* note 28.

40. *Id.*

41. Sonny Bono Copyright Term Extension Act, P.L. 105-298, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C.S. §§ 101-505 (LexisNexis 2009)).

42. Lydia Pallas Loren, *The Purpose of Copyright*, 2 OPEN SPACES (2009), available at <http://www.open-spaces.com/article-v2n1-loren.php>.

43. Copyright Act of 1976, Pub. L. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C.S. §§ 101-505 (LexisNexis 2009)).

44. No Electronic Theft Act, Pub. L. No. 105-147; 111 Stat. 2678 (1997) (codified as amended at 17 U.S.C.S. §§ 101, 506-07; 18 U.S.C.S. §§ 2319-20 (LexisNexis 2009)); Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended at 17 U.S.C.S. §§ 101-505 (LexisNexis 2009)).

45. No Electronic Theft Act, Pub. L. No. 105-147; 111 Stat. 2678 (1997) (codified as amended at 17 U.S.C.S. §§ 101, 506-07; 18 U.S.C.S. §§ 2319-20).

46. 17 U.S.C.S. §§ 1203-1204 (LexisNexis 2009).

47. 17 U.S.C.S. § 512 (LexisNexis 2009). The combination of large penalties along with safe harbor provisions can create an incentive for the service provider to simply comply with the take-down notice without verifying the validity of the notice or assessing the strength of the claim. *See, e.g.,* Mike Masnick, *Teen Fakes Out Google*, TECHDIRT, Apr. 16, 2007, <http://techdirt.com/articles/20070416/003202.shtml>.

48. Brian Hiatt & Evan Serpick, *The Record Industry's Decline*, ROLLING STONE, June 28, 2007, http://www.rollingstone.com/news/story/15137581/the_record_industrys_decline. While CD sales have dropped, there has been a recent resurgence in vinyl record sales that has not been explained. David Browne, *Vinyl Returns in the Age of MP3*, ROLLING STONE, June 12, 2008, http://www.rollingstone.com/news/story/20947918/vinyl_returns_in_the_age_of_mp3.

new online digital music stores and file-sharing programs.⁴⁹ As a result, the record industry's trade group, the Recording Industry Association of America (RIAA),⁵⁰ began filing lawsuits against individuals who allegedly infringed by making files available over the Internet. For several years, the RIAA maintained this litigious position in the face of much public criticism.⁵¹ More recently, the group has shifted its strategy to issuing takedown notices directly to ISPs rather than filing suits against individuals, invoking the DMCA's safe harbor provisions.⁵² Effectively, this strategy moves the copyright enforcement process outside of the traditional legal system and into the realm of hands of individual ISPs.⁵³

B. Blogging changes the scene

Blogging is part of the movement known as Web 2.0, using the unique distributive and collaborative capabilities of the Internet to create and deliver content.⁵⁴ From the early days of the Internet, users created online diaries in various forms, beginning with personal web pages.⁵⁵ Eventually, the popularity of the activity and the communities that it attracted made it ripe for entrepreneurship, and several online services came to fill the need.⁵⁶ A blog can be created

49. See studies cited *infra* notes 179-81.

50. RIAA.com, Who We Are, <http://www.riaa.com/aboutus.php> (last visited Oct. 20, 2009).

51. ELEC. FRONTIER FOUND., RIAA V. THE PEOPLE: FOUR YEARS LATER (2007), available at http://www.eff.org/IP/P2P/riaa_at_four.pdf.

52. See, e.g., Nate Anderson, *No More Lawsuits: ISPs to Work With RIAA, Cut Off P2P Users*, ARS TECHNICA, Dec. 19, 2008, <http://www.arstechnica.com/tech-policy/news/2008/12/no-more-lawsuits-isps-to-work-with-riaa-cut-off-p2p-users.ars>.

53. See Posting of Rick Klau, *supra* note 23. When an ISP receives a DMCA take-down notice, it often immediately takes protective action against the allegedly offending content. See, e.g., *id.* At that point, the burden is on the blogger to file a counter-notification and convince the ISP to replace the content. *Id.* This applies even to take-down notices against content that was explicitly approved or not clearly infringing. *Id.*

54. Wikipedia.org, Web 2.0, http://en.wikipedia.org/wiki/Web_2.0 (last visited Oct. 20, 2009). Web 2.0 includes services, such as YouTube, that face similar considerations. See YouTube DMCA Policy, http://www.youtube.com/t/dmca_policy (last visited Oct. 20, 2009). The content at issue in this Note is mainly MP3s but also includes writing by blog authors.

55. See Wikipedia.org, Blog, <http://en.wikipedia.org/wiki/Blog> (last visited Oct. 20, 2009). As early as 1994, blogs existed in some form. However, those first permutations, while important developmentally, are a far cry from the sophisticated and far-reaching software that makes blogging today such a powerful tool. *Id.*

56. See Wikipedia.org, History of blogging timeline, http://en.wikipedia.org/wiki/History_of_blogging_timeline (last visited Feb. 17, 2010).

for free⁵⁷ in a matter of minutes and costs nothing to maintain.⁵⁸ As such, blogs have become popular places to express personal ideas, opinions, stories, pictures, or most anything else.⁵⁹ Almost every aspect of life, important or not, has a blog dedicated to it: some deal in news, with commentary along every shade of the political spectrum; others explore hobbies such as cooking or photography; while others are strictly for entertainment.⁶⁰ Although subject to criticism for their informality or lack of oversight,⁶¹ blogs have become a central arena for discussions of current events and cultural tastemaking.⁶²

Music, one of the major mediums of culture, is likewise the subject of many blogs.⁶³ However, since music is an auditory experience, the typical blog post of text with accompanying images would not be as effective as a post that contained the song being discussed. By linking to an MP3⁶⁴ of the song hosted on a website (often operated by the blog author), bloggers were able to obtain a

57. Some bloggers, however, do purchase domain names in an effort to seem more established. In addition, if a blogger wishes to host content, such as MP3s, a domain name or another pay service is important. Although this is not free, it is inexpensive. See GoDaddy.com, <http://www.godaddy.com> (last visited Oct. 20, 2009) (offering domain names for under ten dollars per year).

58. Two popular free services include Wordpress, Wordpress, <http://wordpress.org/> (last visited Oct. 27, 2009), and Google's Blogger, Blogger, <http://www.blogger.com/> (last visited Oct. 27, 2009).

59. See Wikipedia.org, Blog, <http://en.wikipedia.org/wiki/Blog> (last visited Oct. 20, 2009).

60. Blog topics range from niche interests like typography, Font72, <http://font72.com> (last visited Oct. 27, 2009), to more general topics like law, Wall Street Journal Law Blog, <http://blogs.wsj.com/law/> (last visited Oct. 27, 2009), or cooking. Bitten Blog, <http://www.bitten.blogs.nytimes.com> (last visited Oct. 27, 2009).

61. Andrew Orlowski, *Google to Fix Blog Noise*, THE REGISTER, May 9, 2003, http://www.theregister.co.uk/2003/05/09/google_to_fix_blog_noise. These elements are appreciated in audioblogs due to the subjective nature of music criticism. See *id.*

62. For a high-profile example, one need look no further than the 2008 presidential election. In that election, blogs played a substantial role, with blogs such as Instapundit, <http://pajamasmedia.com/instapundit> (last visited Feb. 18, 2010), and The Huffington Post, <http://www.huffingtonpost.com> (last visited Feb. 18, 2010), representing the viewpoints of the right and left, respectively, as the political campaigns came to increasingly embrace the Internet as a powerful tool. In addition, both major party candidates, Barack Obama and John McCain, featured a campaign blog on their respective websites. The eventual winner of the presidency, Barack Obama, implemented a blog on the web page of the White House. The Briefing Room – The Blog, <http://www.whitehouse.gov/blog> (last visited Oct. 20, 2009).

63. See, e.g., The Hype Machine, Index of MP3 and Music Blogs, <http://hypem.com/list> (last visited Oct. 20, 2009).

64. An MP3 is an innovation of the late 1990s that allows for a high compression of a sound file without a loss in quality, allowing for songs to be effectively stored in the hard drive space of computers. Wikipedia.org, MP3, <http://en.wikipedia.org/wiki/MP3> (last visited Oct. 16, 2009); see also, Brendan Schulman, Note, *The Song Heard 'Round the World: The Copyright Implications of MP3s and the Future of Digital Music*, 12 HARV. J.L. & TECH. 589, 593 (1999).

level of music coverage that was impossible for print sources. These first audioblogs used roughly the same format: a textual post describing the song (either through an auditory explication or a creative story evoking the feel), followed by a link to the MP3.⁶⁵

Since that time, audioblogs have blossomed into a variety of different forms.⁶⁶ The simplest format features a link to an MP3 along with a paragraph or two of commentary or criticism.⁶⁷ There are variations on this theme, such as blogs containing several songs grouped as a topical or genre-specific playlist.⁶⁸ Other audioblogs are more focused on news and include an MP3 as a sort of illustration for the news story.⁶⁹ Some blogs are run by record buffs who spend their free time scouring record stores or traveling around the world to find interesting and unique albums, which they then copy to their computers, upload to the Internet, and share on their blogs.⁷⁰ The most popular format is a combination of the above; posting news, reviews, and MP3s of both old and new music.⁷¹ The common denominator among these various styles is the inclusion of downloadable MP3s.⁷²

The MP3s posted on an audioblog come from a variety of sources. While some are posted from the blogger's personal collection, there are a number of direct and indirect ways by which an audioblogger can discover a song or receive it from a record label⁷³ or

65. See, e.g., Fluxblog, <http://www.fluxblog.org> (last visited Oct. 16, 2009) (the first audioblog, founded in 2002); Said the Gramophone, <http://www.saidthegramophone.com> (last visited Oct. 16, 2009).

66. See Wikipedia.org, MP3 Blog, *supra* note 18.

67. See *id.*

68. See, e.g., Motel de Moka, <http://www.moteldemoka.com> (last visited Oct. 16, 2009).

69. See, e.g., Stereogum, <http://www.stereogum.com> (last visited Oct. 16, 2009).

70. See, e.g., Benn Loxo du Taccu, <http://www.bennloxo.com> (last visited Oct. 16, 2009) (world music); Diddy Wah, <http://www.diddywah.blogspot.com> (last visited Oct. 16, 2009) (classic pop); Raven Sings the Blues, <http://www.ravensingstheblues.blogspot.com> (last visited Oct. 16, 2009) (psychedelic and avant-garde); Soul Sides, <http://www.soul-sides.com> (last visited Oct. 16, 2009) (soul).

71. See, e.g., Gorilla vs. Bear, <http://www.gorillavsbear.net> (last visited Oct. 16, 2009); I Guess I'm Floating, <http://www.iguessimfloating.blogspot.com> (last visited Oct. 16, 2009); Music for Robots, <http://www.music.for-robots.com> (last visited Oct. 16, 2009); The Catbirdseat, <http://www.catbirdseat.org> (last visited Oct. 16, 2009) (also runs its own record label; see Catbird Records, <http://www.catbirdseat.org/catbirdrecords/index1.shtml> (last visited Oct. 16, 2009)).

72. Wikipedia.org, MP3 Blog, *supra* note 18.

73. There are several potential copyright owners, such as the original artist through creation or a record label through assignment; however, for the purposes of this Note, the references to a copyright owner will be to a record label rather than an artist. While both entities are likely to be concerned about a potential infringement, it is the record label that is more likely to have the funds and desire to bring an action.

promoter.⁷⁴ An audioblogger may convert another file into an MP3 in order to post it on the blog.⁷⁵ Additionally, a record label or artist may also choose to post tracks online, in which case a blog may link to the original MP3 instead of rehosting it.⁷⁶ Due to their promotional potential, audioblogs can be a part of a record company's marketing campaign for an album: by sending an MP3 to a blog that covers similar music, the label hopes that it is posted and heard by listeners who are most likely to enjoy it and buy the album.⁷⁷ Many audioblogs are narrowly focused on particular genres, giving readers an idea of what they can expect when they return to the blog and allowing labels to target their marketing.⁷⁸

Because audiobloggers often do not reveal the source of their MP3s, it can be unclear whether a promotional song was cleared for posting by the record label or leaked illegally to the Internet.⁷⁹ In many cases, record labels must decide what sort of promotional campaign will combat what has become the inevitable digital album leak.⁸⁰ Because of this confusing landscape, audiobloggers are aware that they may be violating the law when they post MP3s without the

74. Honan, *supra* note 16 (Audiobloggers "reported scouring the Internet, band sites such as MySpace.com, and reading small zines and other audioblogs for inspiration. Most also noted that many new bands contact them directly.").

75. See, e.g., Posting of Connor (*New Old Lykke Li: "Tonight" + MP3*) to I Guess I'm Floating, <http://iguessimfloating.blogspot.com/2009/01/video-new-old-lykke-li-tonight-mp3.html> (Jan. 29, 2009, 23:16 EST) (converting the audio track of a video into a downloadable MP3).

76. See, e.g., Posting of Jonny (*These Are My Twisted Words*) to The Most Gigantic Flying Mouth for Some Time, <http://www.radiohead.com/deadairspace/index.php?a=497> (Aug. 17, 2009).

77. See Honan, *supra* note 16 ("Bands, labels, and PR people are constantly in touch with me, and I'll gladly listen to anything sent my way," says Gutowski.).

78. See *id.* ("[A]udiobloggers can go where music magazines can't, covering music that may only be of interest to a small subset of music lovers.").

79. An example of this occurred in December 2008 in advance of the release of *Merriweather Post Pavilion* by the band Animal Collective. Because of the quickness with which the MP3 spread across audioblogs and the commonness of the technique, some bloggers, including Ed Droste of the band Grizzly Bear, were surprised to find out that the availability of the MP3 was actually an illegal leak. Posting of Ed (*Animal Collective's "Brother Sport"*) to Grizzly Bear Blog, <http://grizzly-bear.net/blog/71/animal-collectives-brother-sport/> (Nov. 19, 2008).

80. Despite the tactics mentioned later in this piece, see discussion *infra* Part II.C; text accompanying notes 177-82, the Animal Collective album fully leaked on December 25, 2008, almost two weeks before the album's January 6, 2009 release date. Posting of Will (*Merriweather Post Pavilion Leaked = Christmas Gift?*) to We All Want Someone To Shout For, <http://www.weallwantsomeone.org/?p=251> (Dec. 25, 2008). Despite the leak, the album quickly sold out upon release. Posting by Gil Kaufman (*Animal Collective's Merriweather Post Pavilion Vinyl Release Doesn't Make The Billboard Charts After All*) to MTV Newsroom, <http://newsroom.mtv.com/2009/01/14/animal-collectives-merriweather-post-pavilion-vinyl-doesnt-make-the-billboard-chart-after-all> (Jan. 14, 2009, 12:08 EST).

consent of the record label.⁸¹ However, the benefits of the spike in traffic to the blog outweigh the consequences which, so far, have only involved a requested take-down of the MP3.⁸²

Most audiobloggers are aware that the posting of MP3s is a delicate issue and incorporate a disclaimer into their blog's design.⁸³ The disclaimers typically offer to remove any MP3 that a copyright owner wishes.⁸⁴ They also state that the posted MP3s are intended for previewing only and encourage visitors to purchase the track or album if they enjoy it.⁸⁵ In addition, some audioblogs remove MP3s after a period of time has passed.⁸⁶ Regardless of their effectiveness, these disclaimers, taken in the context of the blog's supportive purposes, appear to be an indication of the sincerity of audiobloggers and their commitment to supporting the community that they love.⁸⁷ Most, if not all, audiobloggers respond promptly to responses by rights holders to remove content, even though it impairs the functionality of their site.⁸⁸

In past decades, before the Internet, music reviews and news were scattered across an array of print sources, making it costly and time-consuming to keep a finger on the musical pulse of the country. Today, dedicated blog search engines mean that this information is only a few seconds away.⁸⁹ In addition, most blogs include a "blogroll" of links to other recommended blogs, allowing a quick and easy way to find new sources of information.⁹⁰ Other services aggregate blogs together, thereby showing which songs and artists are currently

81. Honan, *supra* note 16 ("While some sites are religious in their avoidance of copyrighted material, others have considerably more cavalier attitudes.").

82. See, e.g., Posting of Nathaniel ([MP3] *New Sufjan Stevens: "You Are The Blood"*) to I Guess I'm Floating, <http://iguessimfloating.blogspot.com/2009/01/mp3-new-sufjan-stevens-you-are-blood.html> (Jan. 22, 2009, 13:42 EST) ("Enjoy every second of it—it's a 10 minute track and I doubt it'll be around to sample for much longer than that.").

83. See *infra* notes 77-80 and accompanying text..

84. E.g., *Gorilla vs. Bear*, *supra* note 71 ("[]f you are the owner of a sound file, and would like it removed, holler at us."); *Music for Robots*, *supra* note 71 ("Also, if you own the copyright to one of these songs and would like a song removed, please let us know.").

85. E.g., *Fluxblog*, *supra* note 65 ("Note: MP3s are only offered for a limited time and are changed frequently. Please buy the records from the artist if you like what you hear.").

86. E.g., *Shake Your Fist*, <http://www.shakeyourfist.blogspot.com> (last visited Oct. 23, 2009) ("MP3s posted on this site are . . . removed after two weeks.").

87. See, e.g., *Music for Robots*, *supra* note 71 ("We, the contributors, love and support well-made music and make every effort to support the artists we love by purchasing their work.").

88. See Honan, *supra* note 16.

89. See, e.g., *Google Blog Search*, <http://www.blogsearch.google.com> (last visited Oct. 23, 2009); *Technorati*, <http://www.technorati.com> (last visited Oct. 23, 2009).

90. See, e.g., *FluxBlogroll*, <http://www.fluxblog.org/blogroll> (last visited Feb. 17, 2010).

popular in the blogosphere.⁹¹ This interconnectivity makes it possible to quickly find even the most obscure of blog posts.⁹² When this ease of access is combined with the cultural acceptance of blogging as a legitimate source of information, audioblogs become a powerful force in the musical community and, in some circumstances, can be integral in the success or failure of a band.⁹³

Running an audioblog is a time-consuming endeavor, but it is not without its rewards should the blog prove to be popular. Along with mainstream media, influential bloggers receive promotional copies of records before their official release date as well as free tickets to concerts. In addition, they may have the opportunity to meet the artists about whom they write and to host events.⁹⁴ Some audioblogs also incorporate advertisements, a source of revenue for the bloggers. Combined with the growing cultural clout of audioblogging, these factors make it likely that the format will continue to expand—unless the industry shuts them down.

II. ANALYSIS

Defendants charged with copyright infringement face a daunting task with potentially dire consequences, but they are not unarmed. First, this section discusses the charges likely to be brought against an audioblogger. Next, this section presents and analyzes the various defenses to these charges, focusing on the fair use defense. Finally, this section also speculates on reasons for the lack of cases brought against audiobloggers.

A. *The Charges*

Under 17 U.S.C. § 106, the copyright holder receives a grant of several exclusive rights.⁹⁵ Among these is the exclusive right “to

91. See, e.g., Elbows Music Blog Aggregator, <http://elbo.ws> (last visited Oct. 23, 2009); The Hype Machine, <http://hypem.com> (last visited Oct. 23, 2009).

92. See *id.*

93. E.g., Vulture, http://nymag.com/daily/entertainment/2008/01/vampire_weekend_backlash.html (Jan. 29, 2009, 10:00 EST) (detailing the rise of a band heavily promoted by audioblogs); see also Honan, *supra* note 16 (“Although most of the bloggers we talked to were reluctant to take credit for ‘discovering’ new bands, virtually all also said they had posted music by unsigned bands whose music was not commercially available yet.”).

94. See, e.g., Flickr.com, “Gorilla vs. Bear Presents:” Posters Set, <http://www.flickr.com/photos/20297687@N05/sets/72157603100723026> (last visited Oct. 23, 2009) (displaying a visual catalogue of posters from shows presented by the Gorilla vs. Bear blog).

95. 17 U.S.C.S. § 106 (LexisNexis 2009).

distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending”⁹⁶ and “in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly.”⁹⁷

While playing a cassette tape or CD did not involve making any additional copies, a computer file such as an MP3 is copied to the memory of a computer each time it is accessed.⁹⁸ Thus, playing an MP3 hosted on a website causes a copy to be made, regardless of whether or not that MP3 is explicitly downloaded and stored on the listener’s computer.⁹⁹ (Of course, directly downloading the MP3 also creates a copy on the consumer’s computer.) As such, the copyright holder could potentially bring an infringement claim alleging a violation of the exclusive rights of § 106 for each and every download, direct or indirect, of any MP3.¹⁰⁰

If a plaintiff is successful in an infringement claim under 17 U.S.C. § 501, there are five potential consequences: damages, injunction, impound and destruction, attorneys’ fees, and court costs.¹⁰¹ While none of these is pleasant to a party found liable for infringement, the damages provision, which includes actual and potential statutory damages, is the largest deterrent and is therefore the most relevant here.¹⁰² Because no actual losses need to be shown for a court to award statutory damages, a single infringement can result in a massive judgment against an audioblogger.¹⁰³

96. *Id.* § 106(3).

97. *Id.* § 106(4).

98. See Webopedia.com, What is a Temporary Internet File?, http://www.webopedia.com/DidYouKnow/Internet/2008/Temporary_Internet_Files.asp (last visited Oct. 23, 2009) (explaining that Internet files are temporarily downloaded in order to be accessed on a computer).

99. See *id.*

100. See 17 U.S.C.S. § 501 (LexisNexis 2009).

101. *Id.* §§ 502-05.

102. If the conduct is found to be willful, statutory damages can be as high as \$150,000 per infringement. *Id.* § 504.

103. See *id.* In one case, a jury found Jammie Thomas-Rassert liable in the amount of \$222,000 for sharing 24 songs on the peer-to-peer file-sharing program Kazaa. Capitol Records, Inc. v. Thomas-Rassert, No. 06-1497, 2010 WL 291763, at *2. Doubtful of part of the foundation for the decision, the court later ordered a retrial. This time, the jury returned a verdict of \$1.92 million, or \$80,000 per song. *Id.* Following a motion by Ms. Thomas to set aside the verdict as unconstitutional, the court reduced the damages to \$54,000. *Id.* at *9 While the court declined to rule on the constitutionality of the provision, it did conclude that the previous verdict was higher than necessary for purposes of deterrence. *Id.* at *6-7, 10.

B. Defenses

1. Implied License

Due to the number of audioblogs spread across the Internet and the limited time and money of both bloggers and record labels, it can be difficult for the involved parties to reach a licensing agreement for a song to be posted on an audioblog; the time and transaction costs required are simply too high. This lack of formalities leaves the blogger with no documentation to point to if accused of infringement. In the absence of such formalities, courts may find an implied license exists between a blogger and a copyright owner in certain circumstances. While promising, however, this defense is not likely to be successful in court under the current state of the law.

In *Effects Associates, Inc. v. Cohen*, the Ninth Circuit Court of Appeals held that, so long as the license is “nonexclusive,” it may be inferred from conduct.¹⁰⁴ The court found that the requisite conduct existed where the copyrighted material was handed over to the alleged infringer with the knowledge that it would be used in a way that required a legal license.¹⁰⁵ Thus, a court’s decision would depend on the means by which the audioblogger acquired the MP3 (i.e., from the record label or from some third party source) as well as relevant communications between the record label and the audioblogger.¹⁰⁶ For example, if the blogger received a promotional copy of the album from the label, it may be understood that she is receiving it in exchange for some promotional space—which, in this case, would involve the posting of a review and at least one MP3. Therefore, under this interpretation, a court should find an implied license in these situations.

While helpful, this doctrine is not a perfect fit. Later decisions of the Ninth Circuit have construed such an implied grant narrowly to situations where a commissioned work is physically conveyed to the party that commissioned it.¹⁰⁷ In the case of audioblogs, the audioblogger typically has no role in the creation of the work but rather serves a role akin to a music critic. Still, audiobloggers believe that they “have implied permission for a large chunk of what [they]

104. 908 F.2d 555, 558 (9th Cir. 1990) (quoting 3 MELVILLE D. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 10.03[A] (1989)).

105. *Id.* (citing *Oddo v. Reis*, 743 F.2d 630, 632-34 (9th Cir. 1984)).

106. *See id.*

107. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1026 (9th Cir. 2001); *Country Road Music, Inc. v. MP3.com*, 279 F. Supp. 2d 325, 328 (S.D.N.Y. 2003).

use because it is sent to [them] on the behalf of the artist [or] label.”¹⁰⁸ As is discussed later in this section, record labels are unlikely to try to dissuade audiobloggers of this notion since the practice is essentially free advertising.¹⁰⁹ Because of this reliance, a court could decide to equitably extend the doctrine to include this type of promotional audioblogging. In the meantime, audiobloggers should take care to get official permission where possible and avoid this issue entirely.

2. Fair Use

The most widely used defense against an allegation of infringement is fair use.¹¹⁰ More than a mere excuse for an infringement, a finding of fair use means that there is actually no infringement.¹¹¹ This defense has played an integral role in many cases dealing with the legality of innovative technologies, such as video cassette records (VCRs),¹¹² as well as the way that different sectors of an industry—such as production, distribution, and advertising—interact.¹¹³ The doctrine, codified from the common law,¹¹⁴ is designed to protect the incentives to create—one of the goals of copyright, after all—against the growing monopolistic power of exclusive rights, often in the hands of corporations to which rights are assigned rather than the original creator’s.¹¹⁵ In its fair use analysis, courts employ a balancing test with four non-exclusive factors:

(1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.¹¹⁶

There are also a variety of suggested exceptions listed in the statute, including “criticism, comment, news reporting, teaching

108. Honan, *supra* note 16 (quoting Matthew Perpetua, operator of Fluxblog).

109. *See infra* Part II.B.2.d.

110. 17 U.S.C.S. § 107 (LexisNexis 2009).

111. *Id.*

112. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

113. Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985).

114. H.R. REP. NO. 94-1476 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 1976 WL 14045.

115. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (“The fair use doctrine thus ‘permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.’”) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)); *see also* *Hayden v. Chalfant Press, Inc.*, 177 F. Supp. 303, 312 (S.D. Cal. 1959) (“[W]hile I shall think myself bound to secure every man in the enjoyment of his copyright, one must not put manacles upon science.”) (quoting Lord Ellenborough in the early English case of *Cary v. Kearsley*, 4 Esp. 168, 170 (1802)).

116. 17 U.S.C.S. § 107 (LexisNexis 2009); *see, e.g., Campbell*, 510 U.S. at 577-78.

(including multiple copies for classroom use), scholarship, or research.”¹¹⁷ These are not per se fair use exceptions, but rather situations to be “judged case by case, in light of the ends of the copyright law.”¹¹⁸ In the case of audiobloggers, the balance will likely weigh against a finding of fair use, although the categorization of the use under the first factor leaves room for the balance to sway back in favor of fair use.

a. The purpose and character of the use

Audioblogging is a curious animal; the motivations for starting an audioblog could vary from a hope for commercial gain to a pure love of music and a desire to write about it. Most audiobloggers strive to develop a personal style so as to become experts in a particular niche, but others simply discuss whichever songs interest them, regardless of genre.¹¹⁹ Unsurprisingly, an audioblog will include MP3s of songs that fit the purpose of the audioblog, meaning that an audioblogger will only post songs that she personally enjoys.¹²⁰ This is intended to build support for the band, typically in advance of the release of a new record, by allowing potential fans to both hear a positive review from a reliable source and to whet their appetite with a song from the record.¹²¹ In other cases, the MP3 may be a reminder of the band intended to garner continued support as the band tours or otherwise attempts to stay in the eye of the public.¹²²

However, good intentions alone do not constitute a complete fair use defense. There are two primary considerations to determine the purpose and character of the use: (1) whether the use is transformative or derivative, and (2) whether the use is commercial or non-commercial.¹²³ In recent years, courts have begun to focus on transformativeness as the critical factor in fair use analysis.¹²⁴

117. 17 U.S.C.S. § 107 (LexisNexis 2009).

118. *Campbell*, 510 U.S. at 581; *see Harper & Row*, 471 U.S. at 562 (finding that news reporting can still be an infringement where the use is directly commercial).

119. Wikipedia.org, MP3 blog, *supra* note 18.

120. *Id.*

121. *Id.*; *see, e.g.*, Posting of Chris (*mp3s: girls | hellhole ratrace 10"* [sic]) to Gorilla vs. Bear, <http://gorillavsbear.blogspot.com/2009/07/mp3s-girls-hellhole-ratrace-10.html> (July 15, 2009, 19:15 EST).

122. *See, e.g.*, Posting of Chris (*The Soft Pack X Phoenix*) to Gorilla vs. Bear, <http://gorillavsbear.blogspot.com/2009/10/soft-pack-x-phoenix.html> (Oct. 5, 2009, 11:00 EST).

123. *Campbell*, 510 U.S. at 579, 584.

124. *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006).

A work is transformative when it “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message” as opposed to simply reproducing the original work.¹²⁵ This includes activities such as remix or parody, where the original work becomes an element of a new work.¹²⁶ Courts have applied this label to rap samples remarking on the society portrayed in the original song,¹²⁷ the use of dolls in an art piece critiquing the symbolic status of the toy,¹²⁸ or a home video with a fuzzy snippet of a song playing in the background.¹²⁹ On the other hand, courts have refused to apply the label where a magazine reproduced sections of a book before its release¹³⁰ or where scientists copied academic journals to avoid buying additional copies.¹³¹ Still, if the context of the use creates new uses for the original work, then that use may be considered transformative despite copying the entire work.¹³²

The commercial element of this prong is concerned with the direct use of the allegedly infringing work for commercial gain as opposed to more indirect use by a commercial entity or non-commercial use.¹³³ While courts have backed down from a virtually per se stance against finding fair use where there is any commercial use,¹³⁴ this factor still plays an important role.¹³⁵

In the case of audioblogging, it seems at first that the use is not transformative. The central premise of an audioblog is that a post includes at least one full-length MP3 relevant to the post.¹³⁶ If the

125. *Campbell*, 510 U.S. at 579.

126. *See id.*

127. *Id.* at 569.

128. *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003).

129. *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D.Cal. 2008).

130. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 569 (1985).

131. *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 919-20 (2d Cir. 1994).

132. *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 721 (9th Cir. 2007) (holding that the image served a function beyond simply displaying the picture by pointing to the source of the information).

133. *Am. Geophysical*, 60 F.3d at 921; *see also* *Los Angeles News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 994 (9th Cir. 1998) (“The crux of the profit non-profit distinction is . . . whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”) (quoting *Harper & Row*, 471 U.S. at 562).

134. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 587-88 (1994) (citing and quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)) (disclaiming a dispositive commercial analysis in the case of a parody).

135. *Am. Geophysical*, 60 F.3d at 922 (“The greater the private economic rewards reaped by the secondary user (to the exclusion of broader public benefits), the more likely the first factor will favor the copyright holder and the less likely the use will be considered fair.”).

136. Wikipedia.org, MP3 Blog, *supra* note 18.

MP3 were transformed in any way so as to make it a new work, it would become a remix and cease to fulfill the purpose of an audioblog post.¹³⁷ Despite the focus on the MP3 itself, the audioblogs still contain original content in the form of the writing or photography accompanying the MP3s and, in some cases, the design of the site.¹³⁸ Thus, it is possible that a court would consider the blog itself to be a new work incorporating the MP3s in much the same way that critics in print formats incorporate quotes into an article, giving it a more transformative bend.¹³⁹ In this case, even though the full work is used, the use may still be transformative.¹⁴⁰ Still, the practice of posting downloadable MP3s, especially where they remain available indefinitely, bears the hallmarks of the archiving functions that the courts consider to be an infringement.¹⁴¹

The commercial/non-commercial element of the fair use problem is not much easier to resolve. Because they are typically created by independent individuals, almost every audioblog is non-commercial at its inception, focusing on content over profit. As time goes on, some blogs grow in stature and may attract sponsorship.¹⁴² Some bloggers also choose to place advertisements on the blog,¹⁴³ generating revenue either on a flat-fee or per-impression rate. This revenue can serve a variety of purposes. For some bloggers, any revenue is compensation for a job well done, but in many cases it is a

137. LESSIG, *supra* note 14, at 69. Remixes may, in fact, be posted on the blogs of those who create them. However, this is outside the scope of this article. For an examination of this issue, see *id.*

138. See, e.g., Fluxblog, *supra* note 65 (copyright symbol at bottom of home page).

139. See 17 U.S.C.S. § 107 (LexisNexis 2009); Stanford University Libraries, Copyright & Fair Use – What Is Fair Use?, http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/9-a.html (last visited Oct. 15, 2009).

140. Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701, 721 (9th Cir. 2007).

141. Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 924 (2d Cir. 1994) (“[T]he predominant archival purpose of the copying tips the first factor against the copier, despite the benefit of a more usable format.”).

142. See, e.g., Largehearted Boy, <http://www.blog.largeheartedboy.com> (last visited Oct. 15, 2009) (listing Atomic Books as a sponsor).

143. See, e.g., Blogads.com, http://web.blogads.com/adspotsfolder/choose_blogs (last visited Oct. 16, 2009) (offering ads between \$40 and \$200 for one week on the audioblogs Gorilla vs. Bear, An Aquarium Drunkard, Largehearted Boy, You Ain’t No Picasso, My Old Kentucky Blog, and Chromewaves). Typically, one can expect a well-read audioblog covering current popular music to include advertising, while niche audioblogs usually do not, likely because the number of readers does not make it a realistic option. However, some popular audioblogs make it a point not to include advertising. See, e.g., Fluxblog, *supra* note 65; Said the Gramophone, *supra* note 65. In fact, Said the Gramophone’s 2008 April Fools’ joke was an announcement that the blog would begin to run ads. Posting of Sean (*Let’s Pretend It’s Still Before Noon*) to Said the Gramophone, <http://saidthegramophone.com/april2008.php> (Apr. 1, 2008, 00:59 EST).

way to support the file hosting for the blog¹⁴⁴ or to raise the money to put on concerts.¹⁴⁵

Even though audioblogs may benefit from advertising, they may also serve as an outlet for criticism and news reporting, which further complicates the issue since news reporting and criticism are listed in the statute as categories of works that are likely to be fair uses.¹⁴⁶ Most posts include an MP3 as part of a review of the song¹⁴⁷ or as an illustration for a news story.¹⁴⁸ In some cases, an influential audioblog may be given the exclusive opportunity to premiere a new MP3.¹⁴⁹ Whenever this happens, the track never remains “exclusive” for very long, with other audioblogs soon joining the bandwagon and either linking to the original post or reposting the MP3.¹⁵⁰ With each further report, the value of the news to the Internet as a whole decreases, but the new post may reach a new audience or offer new criticism, making it difficult to gauge how well the practice fits into fair use’s application to the traditional news cycle. In evaluating this type of news reporting, courts will likely look for signs that the posting of the MP3 is intended to scoop the premiere by another source, or the courts will look for other signs of bad faith.¹⁵¹

The weight of the purpose and character of the use will ultimately depend on a court’s finding as to the transformative nature

144. See, e.g., Posting by nyc taper (*NYCTaper Updates: The Best of Times, The Worst of Times*) to nyc taper, <http://www.nyc taper.com/?p=516> (Jan. 25, 2009, 21:01 EST) (expressing a need for a sponsor in order to cover the costs of hosting the site).

145. See, e.g., *supra* note 94 and accompanying text.

146. 17 U.S.C.S. § 107 (LexisNexis 2009).

147. E.g., Posting of Matthew (*Share In This Amazing World*) to Fluxblog, <http://www.fluxblog.org/2009/01/share-in-this-amazing-world> (Jan. 20, 2009, 09:25 EST) (discussing a new song released by Andrew W.K.). But see, e.g., Posting of Nathaniel (*Hit the Road!*) to I Guess I’m Floating, <http://iguessimfloating.blogspot.com/2008/12/hit-road.html> (Dec. 29, 2009, 11:47 EST) (using an MP3 to illustrate a personal anecdote).

148. E.g., Aquarium Drunkard, <http://www.aquariumdrunkard.com/2009/01/29/wild-combination-a-portrait-of-arthur-russell> (Jan. 29, 2009, 05:20 EST) (reporting the release of a new documentary with accompanying MP3s from a recent but unrelated release).

149. E.g., Posting of Connor (*[MP3] New Arizona: “Colors” (IGIF Exclusive)*) to I Guess I’m Floating, <http://iguessimfloating.blogspot.com/2008/09/mp3-new-arizona-colors-igif-exclusive.html> (Sept. 22, 2008, 17:43 EST) (“Today we’re happy to release one of the album’s . . . songs, ‘Colors.’”).

150. E.g., Muruch, <http://www.muruch.com/2008/10/arizona-colors-mp3.html> (Oct. 1, 2008); The Futurist, <http://woxy.com/blog/2008/09/23/arizona-premiere-new-album-on-woxycom-today> (Sept. 23, 2008, 11:33 EST) (posting an MP3 of “Colors” one day after the premiere of the song on I Guess I’m Floating Blog).

151. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985) (“[W]e cannot ignore The Nation’s stated purpose of scooping the forthcoming hardcover and Time abstracts.”).

of the use. Since the MP3s themselves are not transformative, this factor weighs in favor of the copyright holders.

b. The nature of the copyrighted work

This prong of the analysis focuses on “the value of the materials used,” determining the strength of the copyright in the original work and the publication status of the work.¹⁵² This factor recognizes that some works are more deserving of protection than others due to their relation to the goals of copyright law.¹⁵³ Indisputably, the MP3 files made available on an audioblog are no different, in terms of copyright protection, than their physical counterparts,¹⁵⁴ and any song recording is necessarily a creative, original work fixed in a tangible means of expression.¹⁵⁵ While some early recordings have passed into the public domain, these make up such a low percentage of MP3s posted that they are not of concern.¹⁵⁶

This element also focuses on whether or not the work has been published, or if it remains unpublished.¹⁵⁷ An unpublished work receives greater protection, since the artist has made the decision to keep the work private.¹⁵⁸ Although a song may not be publicly available, it must be published in some form in order for it to be available to audiobloggers. While this prong is in favor of the

152. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994) (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (D. Mass. 1841)); see *Harper & Row*, 471 U.S. at 565 (“As the statutory language indicates, a taking may not be excused merely because it is insubstantial with respect to the infringing work.”).

153. *Campbell*, 510 U.S. at 586.

154. See 17 U.S.C.S. § 101 (LexisNexis 2009) (defining “phonorecords” as “material objects in which sounds . . . are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device”) (emphasis added).

155. *Id.* § 102.

156. See 17 U.S.C.S. § 304 (LexisNexis 2009) (extending the renewal period from 28 to 47 years for works not yet in the public domain for a total possible term of 103 years). In order for a recording to clearly have entered the public domain, it must have been created in 1906 or earlier. *Id.* At least one court has extended common-law copyright protection to recordings that would otherwise be in the public domain. *Capitol Records, Inc. v. Naxos of Am., Inc.*, 830 N.E.2d 250, 263 (N.Y. 2005) (holding that the copyright holder of pre-February 15, 1972, works is “entitled to copyright protection under New York common law until the effective date of federal preemption—February 15, 2067.”).

157. *Harper & Row*, 471 U.S. at 554.

158. *Id.* (“The right of first publication encompasses not only the choice whether to publish at all, but also the choices of when, where, and in what form first to publish a work.”).

copyright holder, it is also not considered very important in the fair use analysis.¹⁵⁹

c. The amount and substantiality of the portion used in relation to the copyrighted work as a whole

The definition of audioblogging appears to turn this factor against a finding of fair use; at first glance, the audioblogger has taken the entire song in digital form and made it available—the “whole” to which the statute refers.¹⁶⁰ However, the Court in *Campbell* slightly modified this analysis to assess the reasonableness of the portion copied with respect to the purpose of that copying.¹⁶¹ In fact, works may be copied in their entirety where the purpose or character of the use requires it.¹⁶² In the case of audioblogging, the format demands that the MP3 be a copy of the entire song.¹⁶³ Just as effective parody often requires that the heart of the work be copied in some form so that the audience can recognize the original,¹⁶⁴ a presentation of a song for comprehensive commentary or criticism requires that the song appear in a complete form.¹⁶⁵ Additionally, since full inclusion is the norm in the audioblogging community, using excerpts could mean that readers will go elsewhere to hear the full version, resulting in a loss of traffic. This is a delicate balancing act, requiring that audioblogs use enough to offer an effective product, but not so much as to scoop the market from the record label.¹⁶⁶

159. *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 803 (9th Cir. 2003) (“[T]his [nature of the copyrighted work] factor typically has not been terribly significant in the overall fair use balancing.”) (quoting *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1402 (9th Cir. 1997)).

160. 17 U.S.C.S. § 107 (LexisNexis 2009).

161. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

162. *Id.* at 587 (“[I]n prior cases, we recognize that the extent of permissible copying varies with the purpose and character of the use.”) (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449-50 (1984) (copying an entire work “does not have its ordinary effect of militating against a finding of fair use” when the purpose of the use is to tape a television program for home use)).

163. See Wikipedia.org, MP3 Blog, *supra* note 18.

164. *Campbell*, 510 U.S. at 588 (“Copying does not become excessive in relation to parodic purpose merely because the portion taken was the original’s heart.”).

165. See *id.* In order to be effective, a commentary must discuss the “distinctive or memorable features,” *id.*, of the song. This means that the heart of the work must be reproduced. *Id.* at 589.

166. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 565-66 (1985) (finding that taking an insubstantial amount of the original work did not excuse the taking where the portion taken was “heart” of the work and constituted a substantial portion of the infringing work).

Audioblogging lacks the mitigating factors present in cases where the Court found fair use despite entire or substantial copying.¹⁶⁷ In *Sony Corp. of America v. Universal City Studios, Inc.*, the Court recognized that VCRs could be used for substantial non-infringing uses aside from archiving of copyrighted programming.¹⁶⁸ The purpose of audioblogging is not to shift the time or place of the MP3 but rather to allow another user to access it and, if desired, download the file to another computer—a practice more akin to file sharing.¹⁶⁹ In *Kelly v. Arriba Soft Corp.*, the Ninth Circuit allowed the use of an entire thumbnail image in a search engine since the complete image increased identification of the picture.¹⁷⁰ In audioblogging, however, the use is typically not of a lower-quality version of the song but rather a full quality MP3, making it a free substitution for a commercial version.

At the same time, fair use does not require that the copiers take the minimum amount necessary for their purposes.¹⁷¹ The context of the copying goes a long way toward establishing how much may reasonably be taken; where the use is one that receives greater fair use protection—such as news reporting, parody, or criticism and commentary—a greater taking is allowed.¹⁷²

While the amount and substantiality of the taking factor currently favors the copyright owner, a court's categorization of the use as transformative or as criticism or news reporting could shift the balance back in favor of audiobloggers. While it is less important than the first and fourth factors, this factor may still sway the decision of a court.

167. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 821 (9th Cir. 2003).

168. 464 U.S. at 442 (“[W]e need only consider whether . . . a significant number of them [uses] would be non-infringing [W]e need not . . . [consider] how much use is commercially significant. For one potential use of the Betamax plainly satisfies this standard . . . : private, noncommercial time-shifting in the home.”).

169. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 931-33 (2005) (declining to extend the substantial noninfringing use doctrine to a situation where copyright infringement is intended or encouraged).

170. 336 F.3d at 821 (“It was necessary for Arriba to copy the entire image to allow users to recognize the image and decide whether to pursue more information about the image or the originating web site.”).

171. *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 588 (1994).

172. *Id.* at 589.

d. The effect of the use upon the potential market for or value of the copyrighted work

In this final factor, a court will “consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also ‘whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market’ for the original.”¹⁷³ Where the use is verbatim copying, courts may infer market harm based on principles of substitution.¹⁷⁴ Still, if a defendant can show that the copying serves a separate market function, a court may be more reluctant to impose such an inference.¹⁷⁵

This factor is likely to be the most difficult factor to properly weigh. The record industry is currently in a transitional state between the physical and digital eras and, as a result, an effective business model has yet to emerge.¹⁷⁶ Sales of physical albums have been replaced by individual MP3 purchases.¹⁷⁷ While digital album sales showed robust growth for several years, they have slowed in 2009.¹⁷⁸ In addition, file sharing has not abated, potentially harming overall music sales.¹⁷⁹ However, several studies show that it is difficult to assess the actual effects of file sharing on record sales and that there may not, in fact, be any connection between file sharing and

173. *Id.* at 590 (quoting 4 MELVILLE D. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A][4] (1993)) (footnote omitted).

174. *Id.* at 591 (citing *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)).

175. *Id.* In order for a use to be an infringement under the Copyright Act, the harm must be one covered by the act. *Id.* at 591-92. Where the use alters demand by harming the artistic merit of the original work as opposed to merely superseding it, the harm will not be weighed against the alleged infringer. *Id.* (quoting *Fisher v. Dees*, 794 U.S. 432, 438 (1986)). However, a use may still be an infringement even where the use benefits the copyright holder. *Id.* at 591, n. 21.

176. Peoples, *CD Revenues*, *supra* note 6.

177. Glenn Peoples, *Analysis: Digital Album Sales Big for Now*, BILLBOARD, Jan. 24, 2010, http://www.billboard.biz/bbbiz/content_display/industry/e3i84347827022cc793872383b704fc975c.

178. Glenn Peoples, *Analysis: The Digital Revenue Slowdown*, BILLBOARD.BIZ, Sept. 8, 2009, http://www.billboard.biz/bbbiz/content_display/industry/e3ia3f2289d03ed2216c96c78087debf9f1.

179. Alejandro Zentner, *File Sharing and International Sales of Copyrighted Music: An Empirical Analysis With a Panel of Countries*, 5 B.E. J. ECON. ANALYSIS & POL'Y, Oct. 12, 2005, at Article 21, available at <http://www.bepress.com/bejeap/topics/vol5/iss1/art21>.

a decline in sales.¹⁸⁰ Since audioblogging would produce the same harms as file sharing, if any, it would be just as difficult to determine how sales are affected by the practice. It should be noted, though, that industry advocates have criticized the accuracy of the conclusions in these studies.¹⁸¹

Ideally, posting a downloadable MP3 on an audioblog allows consumers to preview a portion of an album to determine if they would like to purchase it.¹⁸² In some cases, a listener may read about an artist or song on an audioblog, and the MP3 may cause her to purchase a song or album about which she otherwise would have never known.¹⁸³ On the other hand, this sampling may dissuade her from purchasing an album that she may have purchased otherwise.¹⁸⁴ This harm is very similar to the unprotectable harm where a potential purchaser is dissuaded by negative criticism.¹⁸⁵ It would not make sense for a court to allow such a harm where the influence is from a third party critic but hold the same harm against fair use where the criticism and decision whether to purchase all happens in the mind of one person. However, this argument is an uphill battle, as courts have already expressed their skepticism of sampling where the portion sampled is a full version of the song.¹⁸⁶

The actual practices of the record labels may provide an indication of the actual effects on the market, since they are the ones with the sales data from which to make inferences. It is common practice in the record industry for labels to send promotional copies of albums—or, increasingly, MP3s—to audiobloggers with the hope that they will receive positive reviews.¹⁸⁷ When doing this, the label must

180. Felix Oberholzer-Gee & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, 115 J. POL. ECON. 1, Feb. 2007, available at http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf.

181. See Schwartz, *supra* note 2 (directly criticizing the conclusions of the Oberholzer study).

182. See Norbert Michel, *Internet File Sharing: The Evidence So Far and What It Means for the Future*, THE HERITAGE FOUNDATION BACKGROUNDER, Aug. 23, 2004, available at http://www.heritage.org/Research/InternetandTechnology/upload/68094_1.pdf.

183. *Id.*

184. *Id.*

185. See *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 589 (1994).

186. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1018 (9th Cir. 2001). In that case, however, the defendants were simply offering a free download method without any of the criticism or promotional value present in audioblogging. *Id.* These additional elements show greater good faith that could help to sway the opinion of a court.

187. Honan, *supra* note 16 (“Indeed, nearly every blogger we spoke with indicated that he or she had been approached by labels seeking to promote acts.”). In addition, many bands have profiles on MySpace, the popular social networking site, on which they post songs, tour dates,

know that an MP3 will be posted on the site unless they explicitly request otherwise, as that is the general practice of audioblogging. This practice indicates that the labels believe audioblogging tends to benefit, rather than harm, sales. Increasingly, labels are moving their operations online in order to take advantage of the lowered costs and increase in available statistics.¹⁸⁸ In fact, some audioblogs are even run by labels with the intention of developing interest through free samples.¹⁸⁹

Without clear evidence against the alleged harm to sales, this factor weighs in favor of the copyright owners. Even with evidence of harmed sales, however, the fact that the MP3 is a perfect market substitute may still swing this factor against fair use.

C. The Reality

Although an analysis of the defense shows that an infringement suit has a likelihood of success and that the potential monetary damages are great, cases against audiobloggers are quite rare. The few cases brought have involved criminal FBI investigations of full-album leaks rather than civil suits over the posting of MP3s.¹⁹⁰ This lack of lawsuits seems like an anomaly considering the music industry's aggressive public position on peer-to-peer file sharing.¹⁹¹ However, there are some fundamental differences here that help to explain the music industry's willingness to allow audiobloggers to continue to post full-length MP3s.¹⁹²

Since audioblogs serve an important marketing function, it would be counter-intuitive for a record label to take action against one

pictures, blog posts, and videos and interact with fans. The practice even extends to some classical composers. See Posting of Alex Ross (?) to The Rest Is Noise, <http://www.therestisnoise.com/2009/02/who-is-the-american-composer.html> (Feb. 2, 2009) ("Forty-three percent are on MySpace, 39% percent are on Facebook, and 63% either 'do not mind' or 'like the exposure' when people download their music for free.").

188. See, e.g., Band Metrics, <http://www.bandmetrics.com> (last visited Oct. 26, 2009); TuneCore: Digital Music Distribution, <http://www.tunecore.com> (last visited Oct. 26, 2009).

189. Band Metrics, *supra* note 188.

190. See Posting of Daniel Kreps ("Chinese Democracy" Leaker Arrested on Suspicion of Violating Federal Copyright Law) to Rolling Stone's Rock&Roll Daily, <http://www.rollingstone.com/rockdaily/index.php/2008/08/27/chinese-democracy-leaker-arrested-on-suspicion-of-violating-federal-copyright-law> (Aug. 27, 2008 14:30 EST); Michelle Quinn et al., *Blogger Kevin Cogill charged with felony in leak of Guns N' Roses songs*, L.A. TIMES, Aug. 29, 2008, at C-1, available at <http://articles.latimes.com/2008/aug/29/business/fi-music29>.

191. See Schwartz, *supra* note 2.

192. See Schiffman, *supra* note 22.

unless it were truly necessary.¹⁹³ A leak of a full album to the Internet can often be a major blow to the commercial success of the album,¹⁹⁴ but carefully chosen MP3s distributed to audioblogs can build the anticipation for a release, increasing album sales.¹⁹⁵ Outside of the few major record labels, it is very difficult for a song to receive airplay on commercial radio, making audioblogs the best tool to get a song to a targeted audience.¹⁹⁶ Thus, for virtually no cost, a record label can gain support for an upcoming release through exposure on the blogosphere and, due to the lower sales across the industry, can even make a run at the charts.¹⁹⁷ As a result, a symbiotic relationship exists between audiobloggers and labels and, since a lawsuit would only upset the balance that has been created, the legal issues are rarely mentioned.

Notwithstanding the benefits of audioblog promotions, labels may alter their marketing plans for certain releases in order to combat early leaks of the songs onto the Internet.¹⁹⁸ Such a departure from the status quo results in a tug of war between audiobloggers and the labels. Promotional copies of the album are still sent out as part of the advertising campaign, but audiobloggers may specifically be told not to post MP3s. As demand builds for the release, however, incentive increases for an audioblogger to post some tracks and receive a large number of visitors to her blog.¹⁹⁹ To combat this, some releases are watermarked so that any leak can be traced back to a specific copy and, therefore, a specific individual.²⁰⁰ Labels may employ services like Web Sheriff that police the blogosphere and send take-down notices to audioblogs and sites that post MP3s without the consent of the label.²⁰¹ As demonstrated in the comments of posts for

193. Honan, *supra* note 16 (“As the labels seem to recognize, audioblogs are increasingly acting as tastemakers.”).

194. Douglas Wolk, *Days of the Leak*, SPIN, July 31, 2007, <http://www.spin.com/articles/days-leak>.

195. See Schiffman, *supra* note 22.

196. Honan, *supra* note 16.

197. See, e.g., Posting of Dan Gibson (*Friday Chart Preview: Another Week, More Distressing Sales News*) to Idolator, <http://idolator.com/5142767/another-week-more-distressing-sales-news> (Jan. 30, 2009, 11:30 EST).

198. See, e.g., Pretty Much Amazing, <http://prettymuchamazing.com/mp3/im-leaking-all-of-animal-collectives-merriweather-post-pavilion> (Nov. 19, 2008 17:14 EST).

199. See, e.g., Sketchytown, <http://sketchytown.com/blog/2008/11/merriweather-post-pavilion-just-leak-already> (Nov. 17, 2008).

200. Wolk, *supra* note 194.

201. Web Sheriff, Services, <http://www.websheriff.com/websheriff/services.htm> (last visited Oct. 19, 2009) (“Pre-Release Protection - Protecting new films and albums against the damaging effects of internet piracy in the crucial run-up period to commercial release.”).

which Web Sheriff has issued a take-down notice, the service is enormously unpopular with audioblog visitors.²⁰² By hiring an outside service, labels are able to deflect this negative attention²⁰³ away from the label onto a third party, thus preserving the relationship with audiobloggers and allowing the artist and label to present a good cop/bad cop dynamic.²⁰⁴

If recent events are any indication, this tension is coming to a head.²⁰⁵ Although DMCA takedown notices have been used by copyright owners since the passage of the DMCA, the use of them against audioblogs has suddenly become a larger storyline in the music news and criticism community.²⁰⁶ In response to the removal of audioblogs with multiple DMCA take-down notices, more audiobloggers may choose to host their material at their own domain, removing one level of ISP from the process.²⁰⁷ This would reduce the reach of the DMCA and potentially force copyright owners to return the process to the courtroom. Additionally, a recent decision appears to require that a copyright owner determine whether a use is fair before issuing a take-down notice.²⁰⁸ Finally, there are reports of confidential international negotiations prompted by rightsholders' desires to strengthen the policies of the DMCA.²⁰⁹ These complications indicate that there will be a growing tug-of-war over audioblogging, something that is best avoided.

D. Possible Solutions

Due to the legal uncertainty of the current methods and the quickly-changing needs of the music industry, the continued existence of audioblogs and the informative function they serve likely depends

202. See, e.g., Grizzly Bear Blog, *supra* note 79.

203. In fact, a collaboration between the Electronic Frontier Foundation and various universities and law schools has produced a website that collects DMCA take-down notices for public record. Chilling Effects, <http://chillingeffects.org/notice.cgi> (last visited Feb. 18, 2010).

204. See, e.g., Posting of amrit (*Animal Collective Respond To The Web Sheriff Fiasco, Plan An Apology To Grizzly Bear*) to Stereogum, http://stereogum.com/archives/animal-collective-respond-to-the-web-sheriff-fiasco_040491.html (Dec. 9, 2008, 15:56 EST).

205. See, e.g., Posting of Rick Klau to Blogger Buzz, *supra* note 23.

206. See, e.g., Posting of Tom Breihan to Pitchfork News (*Google Shuts Down MP3 Blogs*), <http://pitchfork.com/news/37859-blogger-shuts-down-mp3-blogs/> (Feb. 10, 2010 12:20 EST).

207. See *id.*

208. *Lenz v. Universal Music Corp.* 572 F.Supp.2d 1150, 1154-55 (N.D.Cal. 2008).

209. See EFF: Anti-Counterfeiting Trade Agreement, <http://www.eff.org/issues/acta/> (last visited Feb. 19, 2010). See also Posting of Cory Doctorow to Boing Boing (*ACTA "Internet Enforcement" Chapter Leaks*), <http://www.boingboing.net/2010/02/21/acta-internet-enforc.html/> (Feb. 21, 2010, 11:35 EST).

on innovation rather than stasis. Therefore, it is in the best interests of both parties to find a means of performing the same service without raising the same legal issues.

By using only samples of the songs lasting a minute or less, audiobloggers may be able to swing the third factor of the fair use analysis in their favor, as this could be seen as taking only as much as necessary to comment or criticize.²¹⁰ This use would be more akin to the quoting that occurs in a book review or a short video clip accompanying a movie review.²¹¹ Because the samples could still be downloadable, the threat of legal action remains, but only in the amount that the average critic experiences.²¹² However, offering only a portion of the song would take away one of the major appeals of the audioblog.²¹³ Many retail sites offer previews of songs for entire albums, so such a limited offering would not add any value.²¹⁴

Another option is for audioblogs to refrain from posting downloadable MP3s without the express permission of the record label, giving a clear indication that the song is approved to be posted. A label would not need to send an authorization to every audioblogger, but could set up a page on the label's website or elsewhere where approved MP3s are either listed or posted. The label would only have to communicate explicitly with the audioblogger if it wished to have a special promotion of an exclusive premiere or to ask that an MP3 be removed. This method could also be combined with a compulsory license in order to monetize audioblogging and offset some of the potential losses due to prevented sales.²¹⁵ By setting up a central organization that authorizes MP3s and monitors the blogosphere, labels could retain complete control over what songs are posted on the Internet. However, this is unlikely to become a reality due to (1) the

210. *But see* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801 (6th Cir. 2005) (holding that there is not de minimis inquiry required in copyright infringement analysis and that a license is required for a sample of any length).

211. *See* Harper & Row Publishers v. Nation Enters., 471 U.S. 539, 550 (1985) (quoting Folsom v. Marsh, 9 F. Cas. 342, 344-45 (D. Mass. 1841) ("[A] reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism.")).

212. *See* Stanford Copyright & Fair Use, *supra* note 139.

213. Wikipedia.org, MP3 Blog, *supra* note 18.

214. *See, e.g.,* Amazon.com, LCD Soundsystem, http://www.amazon.com/LCD-Soundsystem/dp/B0006U4UAU/ref=pd_bbs_sr_2?ie=UTF8&s=music&qid=1233460044&sr=8-2 (last visited Oct. 19, 2009) (offering a preview for every song on the album).

215. *See* Electronic Frontier Foundation, A Better Way Forward: Voluntary Collective Licensing of Music File Sharing, <http://www.eff.org/wp/better-way-forward-voluntary-collective-licensing-music-file-sharing> (last visited Oct. 19, 2009) (proposing and describing a compulsory license system for peer-to-peer file sharing networks).

failure of prior movements to establish a compulsory license for file sharing²¹⁶ and (2) the philosophical aversion of many independent labels to practices that seem “corporate.”²¹⁷ Any system that was set up would almost certainly suffer from a lack of participation by labels that either felt like they were giving away their rights or giving away their identity.

Moreover, part of the effectiveness of audioblogging is the easy entry by new bloggers, who are able to bring their own insights to the community.²¹⁸ Imposing costs would prevent this entry and possibly force out audiobloggers who do not wish to sell ads on their blog or are not willing to spend the money to host a site.

The best solution may be the most radical. Due to the vast technological and behavioral changes, the industry may require an entirely new business model.²¹⁹ In fact, the most promising solution is one that eliminates the downloadable MP3: streaming audio.²²⁰ This method allows anybody to hear the song in its full length when and where she wants, but does not give listeners the ability to download the MP3.²²¹ Sites like Lala.com collect licenses from labels to offer streaming songs on the Internet.²²² All that an audioblogger has to do is place the supplied code into the post, a task even easier than uploading a downloadable MP3. One of the traditional advantages of downloadable MP3s is the option to transfer files to a portable device and listen to them away from the computer. However, with the

216. See, e.g., LESSIG, *supra* note 14, at 109-10.

217. See, e.g., Interview by Peter Hepburn with Ian MacKaye, Founder, Dischord Records (Oct. 1, 2004), available at <http://www.cokemachineglove.com/feature/2314/ian-mackaye> (“When you get contracts involved, you obviously get lawyers involved, and that immediately jacks everything up. It creates an overhead that makes everything exponential. Dischord has never used contracts, we’ve never had lawyers.”).

218. See *supra* text accompanying notes 57-58.

219. John Schwartz, *Report Raises Questions About Fighting Online Piracy*, N.Y. TIMES, Mar. 1, 2004, at C2, available at <http://query.nytimes.com/gst/fullpage.html?res=9505E5DE163FF932A35750C0A9629C8B63&sec=&spon=>.

220. Wikipedia.org, Streaming media, http://en.wikipedia.org/wiki/Streaming_media (last visited Oct. 19, 2009).

221. Theoretically, listeners may be able to make a low-quality copy by using software to record the audio as it streams. E.g., Posting of Jasmine France (*How to Record Streaming Audio*) to CNET’s MP3 Insider, http://reviews.cnet.com/8301-12519_7-10031813-49.html (Sept. 3, 2008 17:32 PDT). This would not be a problem unique to audioblogging, though, as it is also possible to record a song from a radio broadcast by using a cassette tape and a tape deck with a record function. However, consumers are less likely to use a more complicated method when high-quality MP3s can be downloaded easily.

222. Lala.com, <http://www.lala.com> (last visited Oct. 19, 2009); see also Jason Kincaid, *Lala May Have Just Built the Next Revolution in Digital Music*, WASH. POST, Oct. 20, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/10/20/AR2008102003688_pf.html.

explosion of wireless technologies, it is possible to access streaming audio even while away from a computer.²²³ Today, a readily accessible audio stream is nearly as good as a file copy on your hard drive.²²⁴

The movement towards a streaming system appears to be gaining speed.²²⁵ With any luck, the recent push towards cloud computing will carry streaming music along with it.²²⁶ Still, it seems that record labels may need more convincing to move out of their ever-narrowing comfort zones,²²⁷ especially since it is still not clear exactly how much money can be made using the technology.²²⁸ If the industry wishes to survive, however, it should adopt a culture of experimentation rather than entrenchment.

By using a centralized license system, record labels can control the availability of their music online while allowing consumers access to that music.²²⁹ In this way, the competing goals of copyright are served—the copyright owner is able to financially benefit from the work, and the public is able to benefit from the wealth of cultural information available.

223. See, e.g., Rhapsody on iPhone and iPod Touch, <http://www.rhapsody.com/iphone> (last visited Oct. 19, 2009).

224. See Roland Banks, *Mobile Music Streaming: A New Alternative to Downloading*, VIDIATOR.COM, http://www.vidiator.com/PDF_product%20sheets/Mobile%20Music%20Streaming.pdf.

225. See Brad Stone, *Apple Strikes Deal to Buy the Music Start-Up Lala*, N.Y.TIMES, Dec. 4, 2009, at B2, available at <http://www.nytimes.com/2009/12/05/technology/companies/05apple.html>. See also Gorilla vs. Bear, *supra* note 71 (using Lala to stream songs instead of hosting them).

226. See Stone, *supra* note 225. Cloud computing involves the movement of data and services from individual computer to a centralized online service. Wikipedia.org, Cloud Computing, http://en.wikipedia.org/wiki/Cloud_computing (last visited Feb. 19, 2010).

227. At least one major label has stated that it does not intend to use a free music model. Eliot Van Buskirk, *Warner Won't Drop Spotify, but Could Shape U.S. Launch*, Wired, Feb. 11, 2010, <http://www.wired.com/epicenter/2010/02/warner-wont-drop-spotify-in-europe-but-could-shape-us-launch>.

228. In late 2009, a report surfaced that Lady Gaga earned only \$167 from the streaming service Spotify in exchange for one million plays, raising concerns about the ability of such services to replace physical sales. Digital Noise (*Economics Dooming Free Streaming Sites?*), http://news.cnet.com/8301-13526_3-10403524-27.html/ (Nov. 23, 2009, 13:59 EST). However, Spotify released a statement that the amount was from a point shortly around the launch of the service, when it had few subscribers, and represented only the fraction paid to a Swedish collecting agency for plays in Sweden. Music Ally (*Spotify Slaps Down Lady Gaga Royalties Rumors*), <http://musically.com/blog/2009/11/24/spotify-slaps-down-lady-gaga-royalties-rumours/> (Nov. 24, 2009, 12:06 EST). Though the truth is that nobody really knows the amount Lady Gaga made overall, *see id.*, the initial rumor may have been enough to cause a knee-jerk reaction against free streaming services.

229. *Id.*

III. CONCLUSION

Like society in general, music is becoming increasingly digital. As part of this process, the promotion, criticism, and distribution of music have all moved onto the Internet. This emerging model is highly efficient for both the content creator and the consumer because it lowers costs across the board and increases the amount of coverage and inventory.²³⁰ However, due to the vagaries with which many record labels operate, the legal standing of audioblogging—a large part of music promotion and criticism—remains unclear.²³¹ Currently, the industry is in an exploratory period where record labels enjoy a friendly relationship with many audiobloggers and so far have lacked the incentives to bring lawsuits against them for offering unapproved full song downloads in MP3 format.²³² However, there have been signs that this leniency is on the wane, leaving audiobloggers—and those who use them as a source for music news and recommendations—wondering what the future may hold.²³³

In a perfect world, fair use would be enough to protect a normally-operating audioblog. Practically, however, the community would be best served by moving to a new model of music distribution that allowed audioblogs to continue their mutually beneficial promotional function while preventing the possibility of abuse. Music is a cultural force that should be celebrated and shared, not traded in

230. Chris Anderson, *The Long Tail*, WIRED, Oct. 2004, <http://www.wired.com/wired/archive/12.10/tail.html>.

231. See Wikipedia.org, MP3 Blog – Legal status, *supra* note 27.

232. *Supra* Part II.C.

233. See Posting of Rick Klau, *supra* note 23.

shady corners of the Internet. With a little planning and good will, even the most corporate of record labels would come to realize that not only is inclusivity good for consumers, it is good for business.

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